Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1976

No. 76- 76-243

ALLIED CHEMICAL CORPORATION,
E.I. du PONT de NEMOURS AND COMPANY,
KAISER ALUMINUM & CHEMICAL CORPORATION,
KAISER ALUMINUM & CHEMICAL SALES, INC.,
PENNWALT CORPORATION,
RACON INCORPORATED,
UNION CARBIDE CORPORATION,
Petitioners,

v.

DAIFLON, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Allied Chemical Corporation, E.I. du Pont de Nemours and Company, Kaiser Aluminum & Chemical Corporation, Kaiser Aluminum & Chemical Sales, Inc., Pennwalt Corporation, Racon Incorporated, and Union Carbide Corporation petition that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Order of Dismissal entered by the United States District Court for the Western District of Oklahoma and that court's denial of respondent's motion to set aside the Order of Dismissal are reported at 64 F.R.D. 690 and appear at Appendix A, pp. 1a-4a, *infra*. The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 534 F.2d 221 and is reprinted at Appendix B, pp. 1b-11b, *infra*.

JURISDICTION

The court of appeals entered its judgment on April 16, 1976, and, on May 24, 1976, denied a timely Petition for Rehearing. A copy of the order denying rehearing appears at Appendix C, p. 1c, *infra*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether, contrary to this Court's decision in *National Hockey League v. Metropolitan Hockey Club, Inc.*, No. 75-1558, the court of appeals erroneously substituted its judgment for discovery decisions by the trial court that were fully supported by the record and were within the discretion properly exercised by the trial court.

STATUTORY PROVISIONS INVOLVED

No statute is involved. Rule 33 of the Federal Rules of Civil Procedure provides in relevant part:

"Rule 33. INTERROGATORIES TO PARTIES

* * *

"(c) **Option to produce business records.**

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries."

Rule 37 of the Federal Rules of Civil Procedure provides in relevant part:

"Rule 37. FAILURE TO MAKE DISCOVERY: SANCTIONS

* * *

"(b) **Failure to comply with order.**

* * *

"(2) **Sanctions by court in which action is pending.**

If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

* * *

"(C) An order . . . dismissing the action . . . ."

STATEMENT

The petitioners are domestic manufacturers and distributors of refrigerant gas. The respondent, Daiflon, Inc., was in the business of importing refrigerant gas from Japan and reselling it in the United States. Daiflon brought suit against the petitioners claiming that they had engaged in a conspiracy in violation of the Sherman Act that had caused Daiflon to cease commercial operations in 1972. (R. Vol. II, pp. 432-38).[1] The jurisdiction of the district court was invoked under Section 4 of the Clayton Act, 15 U.S.C. § 15. Each petitioner denied the essential allegations of the complaint.

One of the basic issues in the case was whether Daiflon's business failure was due to Daiflon's inefficiencies and high costs arising by reason of the nature of its operations or, instead, due to alleged concerted action by the petitioners. An essential item of discovery for petitioners, therefore, was a request for Daiflon's costs. The district court, after twice ordering Daiflon to answer an interrogatory seeking this information and finding an inexcusable and repeated failure by Daiflon to provide meaningful cost data, dismissed the action with prejudice pursuant to Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure. The court of appeals reversed on the ground that the district court had erred in issuing one of its orders compelling an answer to the interrogatory.

A. Proceedings Before The District Court

On July 27, 1973, petitioners served a set of interrogatories that included Interrogatory No. 2, asking for a full statement of respondent's costs of operations. (R. Vol. III, pp. 545-59). On August 29, 1973, the trial court granted

[1] "R" references are to the record printed for use in the court of appeals.

an extension of time within which to answer the interrogatories, and ordered Daiflon to provide answers by September 20, 1973. (*Id.* at 565-66, 570).

One day after the court-ordered deadline, Daiflon served its first answers (and objections) to the interrogatories. (*Id.* at 609-29). In answer to Interrogatory No. 2, Daiflon identified its president, Richard E. Carter, as "solely responsible" for preparing a "full and complete" response and stated that he would require at least sixty more days to derive the cost data from Daiflon's books and records. (*Id.* at 610).

Daiflon presented its second answer to Interrogatory No. 2 (*id.* at 655-57) on October 5, 1973, during the deposition of the company's president, Carter. (*Id.* at 680). The answer invoked Rule 33(c) of the Federal Rules of Civil Procedure and asserted that the burden of deriving the cost information from Daiflon's business records was the same for petitioners as for Daiflon. (*Id.* at 655). Petitioners questioned Carter about the new assertion:

> "Q. Wouldn't the burden be substantially greater for the [petitioners] working from records which were not of their own making than it would be for you in determining the information sought by the interrogatory?
>
> "A. [Carter] Someone totally unfamiliar with the books, yes, sir." (*Id.* at 685, October 5, 1973, Trans., p. (16)).

Petitioners had to adjourn Carter's deposition because they could not complete their examination until Daiflon answered several outstanding interrogatories, including Interrogatory No. 2. (R. Vol. IV, p. 930).

On October 19, 1973, petitioners filed a motion to compel Daiflon to provide a proper answer to Interrogatory No. 2. They pointed out that Daiflon had previously agreed to answer the interrogatory and that the company's president

had testified that he could work with Daiflon's cost records more easily than petitioners. (R. Vol. III, pp. 677-89). Petitioners set out verbatim in their supporting brief the relevant portions of the sworn testimony of Carter at his deposition. (*Id.* at 685-86, October 5, 1973, Trans., pp. (16), (18)).

Daiflon did not dispute either basis of petitioners' motion and did not question the accuracy of the excerpts of the testimony by the company's president. (*Id.* at 715-20). Daiflon submitted an affidavit by Carter (*id.* at 720) that, significantly, did *not* state that the burden of deriving an answer to Interrogatory No. 2 would be substantially the same for petitioners as for Daiflon.

After oral argument on November 26, 1973, the court granted petitioners' motion to compel and ordered Daiflon to answer Interrogatory No. 2 "in good faith, fully and completely." (R. Vol. XII, Nov. 26, 1973, Trans., p. 3).[2] The court said that it was not necessary for Daiflon to state its costs in the precise manner asked for in Interrogatory No. 2 (*id.* at 4), but stressed that a meaningful statement of the company's costs of operation was vital in this lawsuit:

> "This matter of cost in matters of the [respondent] and likewise of the [petitioners] result in a commitment which may show or fail to show the cause of the company going broke, or defunct; and if it went defunct because of overhead or cost or any of these other elements and not because of any Sherman antitrust violations, then there lays the case, the cause of action.
>
> "So it will be the order of the Court that the [respondent] answer Interrogatory 2, and how

[2] The court's written order on this matter, which is reprinted at Appendix D, pp. 1d-2d, *infra*, was filed on January 30, 1974. (R. Vol. IV, pp. 804-05).

> much time do you want? You must answer it in good faith, fully and completely. This, to me, is the heart of your lawsuit." (*Id.* at 3).

The court granted Daiflon's request for sixty additional days within which to prepare an answer. (*Id.* at 4).

On January 28, 1974, Daiflon filed its third answer to Interrogatory No. 2, which read as follows:

> "See attached schedule. The cost information set forth on the attached schedule, while specifically prepared for the eight months ended October 31, 1971, is representative of Daiflon's costs for the years 1970, 1971 and 1972." (R. Vol. IV, p. 798).

The "attached schedule" was a Management Advisory Statement that petitioners had already secured in earlier discovery. (*Id.* at 814, 831). The statement had been prepared in 1971, and set out results of Daiflon's operations for an eight-month period during that year.

On February 5, 1974, petitioners filed their second motion to compel (*id.* at 810-31), contending that Daiflon's third answer to Interrogatory No. 2 was plainly inadequate. On February 20, 1974, during oral argument on petitioners' motion, the court stressed that Daiflon's cost data are "vital" in this lawsuit (R. Vol. XII, Feb. 20, 1974, Trans., p. 14), and warned Daiflon's counsel:

> "So I don't want to dismiss your lawsuit, Mr. Rizley, but let's look at it factually. If you can't give these costs, not average costs or periodic costs in sixty days or ninety days — give you whatever you want — but if you don't do that, you can expect this Court to dismiss your lawsuit.
>
> "Now it's just that plain." (*Id.* at 13).

On February 21, 1974, the court entered its second order that Daiflon provide data regarding its costs of operation in response to Interrogatory No. 2. (R. Vol. IV, pp. 834-35). The court's order, a copy of which is reprinted at Appendix E, pp. 1e-3e, *infra*, contained the following ruling as to the insufficiency of Daiflon's third answer:

> "The Court now finds that said Answer has failed to satisfy the Court's Order and that the attachment to [respondent's] Answer is only an advisory statement for a period of eight months ending October 31, 1971, and that one of the principal questions in this action is whether or not [respondent's] financial difficulties were caused by acts and conduct of the [petitioners] or caused by the cost and operation of its business." (App. E, p. 2e).

The court provided Daiflon another sixty days within which to respond. (*Id.*).

On April 30, 1974, nine months after Interrogatory No. 2 had first been served, Daiflon served its fourth answer to the interrogatory. (R. Vol. IV, pp. 841-45). The response was neither signed nor sworn, and consisted solely of an "attached exhibit": two handwritten worksheets entitled "Daiflon, Inc. Unaudited Statement of Cost of Goods Sold." (*Id.*). The worksheets were totally inadequate to ascertain whether Daiflon went out of business because of its costs, since the worksheets did not contain any entries for selling or general and administrative expense, interest expense, or bank charges on letters of credit.

On May 10, 1974, petitioners moved the court to dismiss Daiflon's action. (*Id.* at 846). In a supporting memorandum petitioners recited the history of Daiflon's previous failures and its violation of the court's order of November 26, 1973. (*Id.* at 847-54). They pointed to several major respects in which Daiflon's fourth answer was not responsive to the in-

terrogatory and thus was violative of the court's order of February 21, 1974. (*Id.* at 850-51). On September 3, 1974, the court granted the motion, determining that:

> "The [respondent's] answer to [petitioners'] interrogatory is totally inadequate. It fails to comply with the Order of the Court and fails to provide essential information critical to the determination of whether or not the [respondent] is entitled to recover damages.
>
> "The Court, having diligently reviewed the files, the briefs and law applicable to the issues raised herein, concludes that the [petitioners'] Motion for Dismissal pursuant to Federal Rules of Civil Procedure 37(b)(2)(C) should be granted due to the *inexcusable and repeated failure* of the [respondent] to make responsive answers to the [petitioners'] interrogatories and that this action is hereby dismissed with prejudice. . . ." (App. A, pp. 2a-3a) (citation omitted) (emphasis added).

Thereafter, although the matter had been exhaustively briefed prior to entry of the Order of Dismissal, including an affidavit submitted by Daiflon (R. Vol. IV, pp. 870-72), the court took the extraordinary step of holding an evidentiary hearing on the adequacy of Daiflon's response to the interrogatory. At the close of the hearing the court made clear that it would have considered a proper answer even if it had been filed after entry of the Order of Dismissal. (R. Vol. XIII, Nov. 26, 1974, Trans., p. 70); no such offer was ever made by Daiflon. The court went on to note that Daiflon's third answer to Interrogatory No. 2, the Management Advisory Statement, was inadequate because it covered only eight months and thus could not be used to determine whether Daiflon had failed due to the costs of its commercial operations. (*Id.* at 70-71). As to the inadequacy of the worksheets that were Dailfon's fourth answer, the court stated to Daiflon's counsel:

> "Of course, any statement having to do with costs must have the administrative costs, as your witness said; it must have the sales cost, as Mr. Robertson says; it must have the interest or cost to the banks of maintaining, carrying paper. All these things are something that's on the burden of the [respondent]." (*Id.* at 71).

The court took Daiflon's motion for reinstatement under advisement (*id.* at 72, 74), and on December 10, 1974, entered its order concluding that

> "the testimony offered by the [respondent] fails to establish justification for the failure to provide an adequate answer to the [petitioners'] interrogatory No. 2 as had been ordered by the Court. The Court finds that the [respondent] was grossly negligent in failing to file a proper answer to said interrogatory; therefore, [respondent's] Motion to Set Aside the Order of Dismissal and to Reinstate its Cause of Action is denied . . . ." (App. A, p. 4a).

Respondent appealed to the Court of Appeals for the Tenth Circuit. Respondent and petitioners stipulated to a joint designation of the record on appeal that included the verbatim excerpts of sworn deposition testimony by Daiflon's president previously brought to the attention of the trial court in connection with petitioners' first motion to compel. (R. Vol. IV, pp. 957, 963).

B. Proceedings Before The Court of Appeals

There is no indication in the opinion of the court of appeals that the court accorded any weight to the history of discovery defaults with regard to Interrogatory No. 2, lasting for more than a year, as found by the district court.

The court of appeals addressed only whether the district court had erred when on November 26, 1973, it granted petitioners' first motion to compel an adequate answer to the interrogatory. (App. B, pp. 7b-11b).

The court of appeals noted that the testimony of Daiflon's president indicated that "it would be easier for him to get the information [to answer Interrogatory No. 2] than for someone else . . . ." (*Id.* at 10b). The court, however, refused to recognize this evidence as properly before it on appeal and concluded that the record contained no evidence recognizable there to support a determination that there existed a substantial difference in the burden of compiling the answer. (*Id.*). It held:

> "Particularly in view of the subsequent drastic sanction imposed, we believe the trial court erred in determining [respondent] could not use Rule 33(c) in answering this interrogatory." (*Id.* at 11b).

On this basis the court reversed the judgment below and remanded the case to the trial court. (*Id.*). On May 24, 1976, the court of appeals denied petitioners' Petition for Rehearing. (App. C).

REASONS FOR GRANTING THE WRIT

On June 30, 1976, one month after denial of the Petition for Rehearing in the present case, this Court, in summarily reversing a judgment of the Court of Appeals for the Third Circuit, upheld district-court discretion to dismiss actions when litigants fail to comply with discovery orders. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 44 U.S.L.W. 3754 (U.S. Sup. Ct. No. 75-1558, June 30, 1976) (per curiam). The *National Hockey League* decision is controlling in this case.

The plaintiffs in both *National Hockey League* and this case failed over extended periods of time to provide adequate answers to interrogatories regarding the costs of their respective commercial operations. In both cases, experienced trial judges patiently extended one deadline after another, and clearly warned the plaintiffs that the information sought in the interrogatories was crucial to the litigation and that failure to comply with court orders would result in dismissal of their actions. In *National Hockey League*, as here, the trial court determined that the plaintiff's failures were inexcusable and required dismissal with prejudice under Rule 37(b)(2)(C). Finally, both decisions were reviewed by courts of appeals that did not dispute the chronologies of events below, but that reversed after cautioning about the extreme nature of dismissals.

In *National Hockey League*, this Court stated the legal standard that controls reviews of dismissals under Rule 37 as follows:

> "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." 44 U.S.L.W. at 3755 (citations omitted).

The Court found support in the record for the findings of the trial court in the hockey litigation and, reversing the judgment of the court of appeals, stressed that however lenient an appellate court may feel when reviewing a dismissal under Rule 37, "the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases. . . ." *Id.*

The court of appeals' reversal of the district court here, on the ground that the trial court erred in determining that Rule 33(c) could not be invoked by Daiflon, reflects the same failure to recognize trial-court discretion with respect

to discovery matters that this Court cautioned against in *National Hockey League*.

The trial court's first order that Daiflon provide a full answer to Interrogatory No. 2 was entered a full four months after the interrogatory was served, during which time Daiflon had represented that it would answer the interrogatory and had requested two extensions of time within which to do so. When a substantial delay in discovery results from such conduct by a party, it is certainly within the discretion of the trial court to conclude that proper management of pretrial proceedings requires an order rejecting the adequacy of the belated tender of documents and instructing that a full and complete answer to the interrogatory be provided. The court of appeals here, however, did not defer to the discretion of the trial court to manage the course of the litigation before it.

Moreover, there is full support in the record for the trial court's ruling with respect to Rule 33(c), under which a tender of documents in lieu of an answer to an interrogatory is permitted only if "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served. . . ."

Petitioners set out in their brief to the trial court in support of the first motion to compel, undisputed excerpts of sworn deposition testimony by Daiflon's president that he could answer Interrogatory No. 2 by reference to his company's books and records more easily than petitioners, a proposition not disputed in the affidavit of respondent's president. (R. Vol. III, p. 720). The deposition excerpts were sworn statements that, like affidavits, were proper for submission to the trial court in the motion proceedings below. *See, e.g., Tormo v. Yormack*, 398 F. Supp. 1159, 1168-69 (D. N.J. 1975); *Illinois Migrant Council v. Pilliod*, 398 F. Supp. 882, 886 n.4 (N.D. Ill. 1975). The court of appeals observed only that *it* could not consider the excerpts because the transcript of the deposition had not been filed

in the district court.[3] (App. B, p. 10b). The court of appeals simply ignored the fact that the sworn excerpts were included in the record on appeal under the joint designation of the parties. (R. Vol. IV, pp. 957, 963). Its decision not to recognize this evidence on appeal is plainly erroneous,[4] and even contradicts the established law in the Tenth Circuit. *See Gomes v. Williams*, 420 F.2d 1364, 1368 (10th Cir. 1970).

In sum, the court of appeals refused to permit imposition of a dismissal sanction for failure to comply with discovery orders. It reversed the district court on a ground that was plainly erroneous and failed to accord any weight to discretionary determinations of the district court. The approach of the court of appeals is contrary to that mandated by this Court in *National Hockey League* and fails to reflect this Court's emphasis on the need for availability of a sanction of dismissal in order to ensure necessary compliance with discovery orders. As this Court observed in *National Hockey League:*

> "There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the

[3] The court of appeals did not mention the fact that the petitioners could not file the transcript because it had been necessary for them to adjourn the deposition pending receipt of answers by Daiflon to several interrogatories, including Interrogatory No. 2. (R. Vol. IV, p. 930). No answers were forthcoming and the deposition accordingly had not been resumed when the trial court on February 21, 1974, stayed all discovery until an answer to Interrogatory No. 2 was provided (App. E, p. 3e), and thereafter dismissed Daiflon's action.

[4] The only authority cited by the court of appeals, Dictograph Prods. Co. v. Sonotone Corp., 231 F.2d 867 (2d Cir.), *appeal dismissed*, 352 U.S. 883 (1956), is inapposite. The depositions involved in *Dictograph Products* were not at any time called to the attention of the trial court and were not printed in the appendices. There is no indication that they were included anywhere within the designated record on appeal.

> severity of outright dismissal as a sanction for failure to comply with a discovery order . . . .
>
> "But here as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." 44 U.S.L.W. at 3755.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX A

DAIFLON, INC.,
Plaintiff,

v.

ALLIED CHEMICAL CORPORATION et al.,
Defendants.

No. CIV-72-483.

United States District Court,
W.D. Oklahoma.

Sept. 3, 1974.

ON MOTION TO SET ASIDE ORDER
OF DISMISSAL DEC. 10, 1974.

ORDER OF DISMISSAL

BOHANON, District Judge.

The defendants have jointly moved to dismiss this cause of action pursuant to Rule 37(b)(2)(C) based upon plaintiff's failure to answer interrogatories as ordered by this Court on February 21, 1974.

The files and records in this case reveal that defendants' Interrogatory No. 2 was originally served upon plaintiff January 27, 1973. On September 21, 1973, plaintiff responded that it would require 60 days from the time its books and records were returned to it in order to prepare full and complete answers. On October 5, 1973, the plaintiff filed an amended answer stating that the information sought could be derived from the business records of the plaintiff. Thereupon, defendants filed a motion to compel an answer to Interrogatory No. 2, and on November 26, 1973, the Court ordered plaintiff to answer Interrogatory No. 2, and

at the request of the plaintiff the Court granted the plaintiff 60 days to have written responses to Interrogatory No. 2 prepared from the plaintiff's books and records by outside consultants. On January 28, 1974, plaintiff filed a second amended answer which was inadequate and revealed that the plaintiff's books and records had not been reviewed. This answer was composed of an accountant's advisory statement covering a period of eight months ending October 31, 1971; information that was already possessed by the defendants. On February 21, 1974, defendants filed a second motion to compel answer. The Court concluded that the plaintiff had failed to satisfy the Court's order that defendants be provided a full and complete answer. The Court again expressed the view that a principal question is whether plaintiff's financial difficulty had resulted from the nature of plaintiff's own operations, and advised plaintiff's counsel that the action would be dismissed if the plaintiff continued in its failure to provide an adequate answer. Thereupon the Court granted the plaintiff an additional 60 days in which to answer the interrogatory, and stated that if more time became necessary the Court would grant a good faith request for it. On May 2, 1974, the plaintiff submitted yet another answer to Interrogatory No. 2 composed of a two-page work sheet entitled "Daiflon, Inc. — Unaudited Statement of Cost of Goods Sold" which contains a disclaimer, "Prepared from Company Records without Independent Verification thereof and Accordingly No Opinion is expressed thereon — Unaudited." No identification of the author of the report is contained therein. The plaintiff's answer to defendants' interrogatory is totally inadequate. It fails to comply with the Order of the Court and fails to provide essential information critical to the determination of whether or not the plaintiff is entitled to recover damages. Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 50 F.R.D. 13 (E.D.Pa., 1970) affirmed; Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (C.A. 3, 1971).

The Court, having diligently reviewed the files, the briefs and law applicable to the issue raised herein, concludes that the defendants' Motion for Dismissal pursuant to Federal Rules of Civil Procedure 37(b)(2)(C) should be granted due to the inexcusable and repeated failure of the plaintiff to make responsive answers to the defendants' interrogatories and that this action is hereby dismissed with prejudice, and

It is so ordered.

ON MOTION TO SET ASIDE
ORDER OF DISMISSAL

This cause came on for hearing before the Court on the 26th day of November, 1974, upon Motion of the plaintiff to set aside the Order of Dismissal entered herein on the 3rd day of September, 1974, and to reinstate the plaintiff's cause of action.

The Court heard argument of counsel for plaintiff in support of said Motion; thereupon, counsel for defendants presented argument in support of their Motion that the Court was without jurisdiction to entertain the plaintiff's Motion to Reinstate, plaintiff having previously appealed the Court's Order of Dismissal. Thereafter, the Court overruled defendants' Motion and Objection to the Jurisdiction of this Court.

Plaintiff introduced the oral testimony of the certified public accountant who had prepared the answer to interrogatory No. 2 in support of its Motion to Reinstate this Case. This being the only evidence plaintiff's counsel desired to offer, the Court heard argument of plaintiff's counsel in support of said Motion and argument of defendants' counsel in opposition thereto.

After considering the evidence offered, arguments of counsel and briefs relevant to the issue before the Court,

the Court finds that the testimony offered by the plaintiff fails to establish justification for the failure to provide an adequate answer to the defendants' interrogatory No. 2 as had been ordered by the Court. The Court finds that the plaintiff was grossly negligent in failing to file a proper answer to said interrogatory; therefore, plaintiff's Motion to Set Aside the Order of Dismissal and to Reinstate its Cause of Action is denied, and

It is so ordered.

APPENDIX B

DAIFLON, INC.,
Plaintiff-Appellant,

v.

ALLIED CHEMICAL CORPORATION et al.,
Defendants-Appellees.

No. 74-1796.

United States Court of Appeals,
Tenth Circuit.

Argued Sept. 15, 1975.

Decided April 16, 1976.

Rehearing Denied May 24, 1976.

Before HILL, SETH and DOYLE, Circuit Judges.

HILL, Circuit Judge.

This appeal follows the trial court's dismissal of an antitrust action brought by appellant Daiflon, Inc., against numerous corporations, appellees in this proceeding. Appellant was engaged from January, 1969, to October, 1972, in the business of importing refrigerant gas from Japan, repackaging the gas, and distributing the gas to wholesalers and retailer contractors in a market of about thirty states. The appellees are domestic manufacturers and distributors of refrigerant gas. On July 12, 1972, appellant commenced this action against these appellees and a trade association (later dismissed as a party without prejudice).

Ultimately, appellant's allegations were incorporated into a second amended complaint. Appellant alleged the appellees "engaged in an unlawful combination and conspiracy in restraint of the aforesaid interstate trade and commerce in refrigerant gases in violation of § 1 of the

Sherman Act (15 U.S.C. § 1)." This combination and conspiracy was alleged to have sought to eliminate price competition in the sale and distribution of refrigerant gas used for replacement purposes. Appellant also alleged appellees had attempted to monopolize the manufacture and distribution of refrigerant gases by using predatory pricing of refrigerant gas for replacement purposes and disparagement of appellant and its products, in violation of § 2 of the Sherman Act (15 U.S.C. § 2). Appellant further claimed appellees had, in fact, monopolized the market for refrigerant gases in violation of § 2 of the Sherman Act. The damages were believed to be more than $3,000,000; elements of those damages were alleged to include (1) lost profits from sales not made due to the violations, (2) lower prices appellant had to charge on sales because of the absence of competitive conditions, (3) substantial injury to appellant's good will, and (4) the irrevocable and complete destruction of appellant's business. Appellant requested a judgment in an amount three times its actual damages and an injunction.

The facts leading to dismissal of this action revolve around one interrogatory. The interrogatory in issue is No. 2 in the second set of interrogatories to appellant. It was served on July 27, 1973, and reads as follows:

> 2. With respect to each individual item of refriggerant gas identified in the answer to Interrogatory No. 1, state your direct material cost, direct cost of production, overhead cost of production, selling expense, and general administrative expense per pound prepaid freight to (1) Houston, Texas, (2) Oklahoma City, Oklahoma, (3) Kansas City, Missouri, and (4) Minneapolis, Minnesota, as of the first of each calendar month of plaintiff's commercial operations.

Appellant filed answers and objections to this set of interrogatories on September 24, 1973. As to Interrogatory No. 2 appellant said:

> The books and records of Daiflon, Inc. pertaining to cost data have been in the offices of Conner, Winters, Ballaine, Barry and McGowen, attorneys for Allied Chemical Corporation, for approximately three weeks. Before that time, these documents were in transit between Galveston, Texas and Tulsa, Oklahoma for approximately ten (10) days. Richard E. Carter, plaintiff's president and the person solely responsible for preparing the answer to this interrogatory, resides in Galveston and has not had access to the pertinent raw cost data for the last thirty (30) days due to the circumstances described above. Moreover, the information requested by this interrogatory is highly detailed, and it is anticipated that plaintiff will require an additional sixty (60) days from the date its books and records are returned to it to prepare full and complete answers. In this regard, it should be noted that defendants received, by stipulation, ninety (90) days within which to answer plaintiff's interrogatories involving cost information.

On October 9, 1973, appellant filed an amended answer to Interrogatory No. 2. That answer was as follows:

> The information sought in this interrogatory may be derived or ascertained from the business records of the plaintiff. The burden of deriving or ascertaining the answer to the interrogatory is substantially the same for defendants as for plaintiff. Therefore, pursuant to Rule 33(c), F.R.C.P.[1] plaintiff has and will continue to

[1] Rule 33(c) provides:

> Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the in- (continued)

> afford defendants a reasonable opportunity to examine, audit or inspect the business records of the plaintiff which contain the information sought herein.

Appellees were not satisfied with this answer and filed a motion to compel appellant to answer the Interrogatory. Appellant responded and a hearing was held. The court ruled appellant had to answer the Interrogatory "in good faith, fully and completely" and granted appellant sixty days for the task. The court also stated:

> This matter of cost in matters of the plaintiff and likewise of the defendant result in a commitment which may show or fail to show the cause of the company going broke, or defunct; and if it went defunct because of overhead or cost or any of these other elements and not because of any Sherman antitrust violations, then there lays the case, the cause of action.

The court also stated to appellant's counsel that he did not have to follow appellees' precise manner in setting out the information and told counsel to ". . . give these costs in your manner, that of any qualified CPA."

Appellant filed another amended response on January 28, 1974. The response was composed of a schedule labeled "Daiflon, Inc. Management Advisory Statement For The Eight Months Ended October 31, 1971." Appellant's counsel averred that this cost information was representative of appellant's costs for the years of 1970, 1971 and 1972.

[1] (continued)

terrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

Appellees, however, were dissatisfied with this response and filed on February 5, 1974, a second motion to compel appellant to answer Interrogatory No. 2. A hearing was held on February 20, 1974. At that hearing the trial judge warned appellant's counsel in the following manner.

> So I don't want to dismiss your lawsuit, Mr. Rizley, but let's look at it factually. If you can't give these costs, not average costs or periodic costs in sixty or ninety days — give you whatever you want — but if you don't do that, you can expect this Court to dismiss your lawsuit.

In a written order, the trial court found that the second amended answer failed to satisfy the court's order and that "the attachment to plaintiff's answer is only an advisory statement for a period of eight months ending October 31, 1971, and that one of the principal questions in this action is whether or not plaintiff's financial difficulties were caused by acts and conduct of the defendants or caused by the cost and operation of its business." Appellant was granted 60 days to answer "in good faith setting out in detail its cost for the years involved for the production and distribution of refrigerant gas."

Appellant received one time extension and filed its third amended answer on May 1, 1974. The answer was an attached schedule entitled "Daiflon, Inc. Unaudited Statement of Cost of Goods Sold" and covered four years (March 1, 1969, to February 28, 1973).

On May 10, 1974, appellees filed, pursuant to F.R.Civ.P. 37(b)(2)(C) [2] a motion to dismiss the action. The

[2] Rule 37(b)(2)(C) provides in pertinent part:

> (2). *Sanctions by court in which action is pending.* If a party . . . fails to obey an order to provide or permit discovery . . . , the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> * * * * *
>
> (C) An order . . . dismissing the action or proceeding . . . .

following are some of the alleged inadequacies in the response: (1) information by year not by month; (2) information only by type of gas not by cylinder size; and (3) incomplete information reflecting general and administrative costs incurred in production and no information regarding distribution costs. Appellant filed a written response together with an affidavit from James R. Robertson, a CPA who prepared the worksheet answer. Robertson stated that appellant's books do not contain information from which an allocation of costs associated with each cylinder size can be made; appellant's accounting methods do not accrue costs and expenses at the end of each month, and inventories were taken at the end of each year or as required (consequently monthly cost information cannot be prepared); costs of distribution with respect to each type of gas varied based upon the type of sale and the appellant's books contain no analysis with respect to sales which were F.O.B. plant, F.O.B. destination, prepaid or freight allowed (several hundred more hours would be required to analyze these costs); deposits on steel cylinders, amortization of steel cylinder inventories and deposits in excess of costs are not expense items but merely reflect profits made on deposits on containers which were not returned; appellant's books do not breakdown sale expense on a per pound basis or contain a schedule showing how many pounds each salesman sold; general administrative expenses are not assignable to cylinder size or type of gas; interest and banking charges on letters of credit are a fluctuating expense and are not assignable to refrigerant grade or cylinder size.

Appellees responded to this answer and then the trial court, without a prior hearing, entered an order dismissing the action with prejudice pursuant to Rule 37(b)(2)(C). The court found:

> The plaintiff's answer to defendants' interrogatory is totally inadequate. It fails to comply with the Order of the Court and fails to provide essential information critical to the determination of whether or not the plaintiff is entitled to recover damages.
>
> The Court, concludes that the defendants' Motion to Dismiss . . . should be granted do (sic) to the *inexcusable and repeated failure* of the plaintiff to make responsive answers to the defendants' interrogatories and that this action is hereby dismissed with prejudice . . . [emphasis added].

On September 20, 1974, appellant filed a motion to set hearing and reinstate the action pursuant to F.R.Civ.P. 60(b). Appellant filed a notice of appeal on October 2, 1974. On November 26, 1974, a hearing on the motion to reinstate was held. The trial court denied appellees' claim of lack of jurisdiction under Rule 60(b) after a notice of appeal had been filed. Robertson was called and questioned concerning the information available from the books and records of appellant. On December 10, 1974, the court entered an order denying appellant's motion. The court stated:

> . . . the testimony offered by the plaintiff fails to establish justification for the failure to provide an adequate answer to the defendants' interrogatory No. 2 as had been ordered by the Court. The Court finds that the plaintiff was grossly negligent in failing to file a proper answer to said interrogatory . . . .

Daiflon, Inc. v. Allied Chem. Corp., 64 F.R.D. 690 (W.D.Okl. 1974).

Appellant initially argues the trial court erred in finding the first amended answer to Interrogatory No. 2 — the taking of the option under Rule 33(c) to produce books and records from which the answer could be derived — was not a sufficient answer. Appellees contend this answer was not sufficient because appellant could develop information responsive to the interrogatory from the books and records

more easily than could appellees. We are unsure about the basis of the trial court's decision in upholding appellees' motion to compel an answer. The excerpt presented to this Court from the hearing on that motion does not contain any oral statement by the trial court concerning its reasons and only a brief written order was entered.

Rule 33(c) gives the party served the option of producing records from which the answer can be obtained instead of preparing a direct answer when ". . . the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served . . . . The party served must specify the records and cannot merely indicate that the information sought may or may not be found in the records made available. *In re Master Key Antitrust Litigation*, 53 F.R.D. 87 (D.Conn.1971). The notes of the Advisory Committee on Rules indicate that subdivision *c* relates " . . . especially to interrogatories which require a party to engage in burdensome or expensive research into his own business records in order to give an answer." Moreover, if an answer is readily available in a more convenient form, Rule 33(c) should not be used to avoid giving the ready information to a serving party. *See Atlanta Fixture & Sales Co. v. Bituminous Fire & Marine Ins. Co.*, 51 F.R.D. 311 (N.D.Ga.1970).

In their motion to compel an answer, appellees relied upon several grounds: (1) answer left interrogating party to speculate if answers could even be found in tendered records, *In re Master Key Antitrust Litigation, supra;* (2) the burden of deriving the answer would not be substantially the same for both parties, *Thomason v. Leiter*, 52 F.R.D. 290 (M.D.Alabama 1971); and (3) answer did not specify which records the information could be derived from, *Budget Rent-A-Car of Missouri, Inc. v. Hertz Corp.*, 55 F.R.D. 354 (W.D.Mo.1972). Appellant filed a response with the following affidavit of appellant's president attached.

> I am the president of Daiflon, Inc. The information requested by Interrogatory No. 2 of the defendants' second set of interrogatories can be derived or ascertained from the books and records of Daiflon, Inc., which are presently in the custody of John S. Athens, attorney for Allied Chemical Corporation. Upon request made by counsel for defendants, I shall segregate those books and records from which the information requested in Interrogatory No. 2 can be derived. Daiflon, Inc. does not have available in more convenient form the information requested by Interrogatory No. 2

This affidavit clearly indicates appellant was willing to specify the appropriate records, thus answering appellees' objection in that regard. The affidavit also represents that the information requested is indeed available in the tendered documents, answering the problem dealt with in *In re Master Key Antitrust Litigation, supra.*[3] The affidavit does not clearly respond to the "substantially similar burden" argument of appellees.

Appellees continue to argue on appeal that the burden of deriving or ascertaining the answer would *not* be substantially the same for both parties. That argument is ad-

[3] We have considered a possible conflict between the representation of appellant's president that the information can be derived from these records and the affidavit of appellant's accountant that some of the information cannot be derived from appellant's records. Appellees, however, have mitigated our concern by describing the matter raised by the accountant, Robertson, in this manner: "Robertson confirmed under oath that average per-pound figures for the expenses and charges missing from Daiflon's fourth answer could have been calculated and presented in the same manner used for the data showing cost of goods sold. The issue raised by Robertson was whether those figures would be 'meaningful' or 'pertinent', not whether they could be derived from Daiflon's books and records. Robertson's view about the significance of those figures, of course, has no bearing on Daiflon's obligation to produce them."

vanced as support for the trial judge's order compelling another answer to the interrogatory and denying appellant's use of Rule 33(c). Appellees rely on testimony of appellant's president at a deposition which indicates it would be easier for him to get the information than for someone else. Appellant attempts to minimize this testimony by showing its larger context at the hearing. The deposition was not filed with the trial court as provided for in Rule 30(f), F.R.Civ.P., and was brought to the trial judge's attention via briefs of counsel and perhaps oral argument. Statements of counsel in appellate briefs generally are not part of the record. *See, e.g., United States v. Gazda*, 499 F.2d 161 (3rd Cir. 1974). Also we may not properly consider depositions not filed in the district court in determining an appeal. *See Dictograph Prods. Co. v. Sonotone Corp.*, 231 F.2d 867 (2d Cir. 1956), *appeal dismissed*, 352 U.S. 883, 77 S.Ct. 104, 1 L.Ed.2d 82 (1956). Consequently, we find no evidence supporting a determination that the burden of ascertaining an answer to this interrogatory would be less for appellant than for appellees.

The question of the propriety of appellant's use of the Rule 33(c) option to answer the interrogatory came to the trial court via appellees' motion to compel under F.R.Civ.P. 37(a). Appellees alleged the answer to be incomplete, F.R.Civ.P. 37(a)(3). We believe appellees had the burden of proving the answer to their interrogatory was indeed incomplete. Based upon our above discussion, appellees point to no evidence recognizable in this court to support a determination that a substantial difference in the burden of compiling the answer existed.

Appellant had offered to remedy the other "incomplete" aspects of its answer and it properly should have been compelled to do so. However, denying appellant the option available under Rule 33(c) because of those failures — particularly lack of specificity — would not comport with the purpose of modern discovery. Rather, a denial on that basis

when an offer to specify was made would merely punish the erring party and not assist in bringing the facts to light. As this Court said in *Robison v. Transamerica Ins. Co.*, 368 F.2d 37 (10th Cir. 1966): "We think the spirit and purpose of the rule would have been best served and the expense of this appeal avoided if appellant had been allowed to answer instanter, as apparently he was prepared to do." Our review of the record indicates appellant had to engage in extensive research for its subsequent third amended answer; thus, some substance is apparent in appellant's claim that a substantially similar burden existed in compiling this answer from the books and records. Particularly in view of the subsequent drastic sanction imposed, we believe the trial court erred in determining appellant could not use Rule 33(c) in answering this interrogatory.

This determination precludes consideration of other numerous issues raised. This case is REVERSED and REMANDED to the trial court to allow appellant to supplement its first amended answer with the list of the books and records from which the answer can be derived. We note that some of the information requested has been provided to appellees via subsequent amended answers.

APPENDIX C

MAY TERM — MAY 24, 1976

Before The Honorable Delmas C. Hill, The Honorable Oliver Seth and The Honorable William E. Doyle, Circuit Judges

DAIFLON, INC.
Plaintiff-Appellant,

vs.

ALLIED CHEMICAL CORPORATION; E.I. du PONT de NEMOURS AND COMPANY; KAISER ALUMINUM & CHEMICAL CORPORATION; KAISER ALUMINUM & CHEMICAL SALES, INC.; PENNWALT CORPORATION, RACON INCORPORATED, and UNION CARBID CORPORATION,
Defendants-Appellees.

No. 74-1796,

This matter comes on for consideration of the petition for rehearing filed by the appellees in the captioned cause.

Upon consideration whereof, it is ordered that the petition for rehearing is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

A true copy
Teste
Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit
/s/ Mary A. Sherman
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DAIFLON, INC.,
Plaintiff,

v.

ALLIED CHEMICAL CORPORATION, et al,
Defendants.

NO. CIV-72-483

ORDER

In Interrogatory No. 2 of Defendants' Second Set of Interrogatories, plaintiff was requested to state its cost of production, selling expense, etc., as well as prepaid freight of refrigerant gas to destinations specified therein.

In its initial answer to said interrogatory, plaintiff asserted that it would require substantially more time than ordinarily allotted for such purpose in order to "prepare full and complete answers."

Thereafter, and on or about October 5, 1973, plaintiff served upon defendants what was called an Amended Answer to Interrogatory No. 2. In the Amended Answer, plaintiff sought to invoke the option provided in Rule 33(c), FRPC.

Thereafter defendants filed their application for an order compelling plaintiff to provide a complete answer to defendants' Interrogatory No. 2, together with a supporting brief. Plaintiff responded to defendants' motion, and the matter was orally presented on the 26th day of November, 1973.

The Court, having considered the motion, the briefs, and argument of all parties, finds that defendants' motion is well taken and should be sustained.

IT IS THEREFORE ORDERED that plaintiff, within 60 days from November 26, 1973, serve upon defendants a full and complete answer to Interrogatory No. 2.

DATED this 30th day of January, 1974.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DAIFLON, INC.,
Plaintiff,

vs.

ALLIED CHEMICAL CORPORATION, et al.,
Defendants.

No. 72-483 Civ.

ORDER

On November 26, 1973, the undersigned Judge conducted an open-court hearing on numerous matters on the above entitled case, one particular matter being the question of whether or not plaintiff had properly answered defendants' Interrogatory No. 2 (second set). During this hearing the Court entered an Order from the bench directing plaintiff to answer fully, completely and in good faith defendants' Interrogatory No. 2 (second set) inasmuch as defendants had answered plaintiff's similar Interrogatory dealing with the same questions and subject matter. The plaintiff was given 60 days in which to answer said Interrogatory. The Court was not furnished a formal Order directing plaintiff to answer Interrogatory No. 2 (second set) until January 30, 1974, at which time said Order was filed, and said Order is by reference made a part hereof.

The record discloses that on January 28, 1974, plaintiff made an effort to answer said Interrogatory of defendant, plaintiff's Answer by reference being made a part of this Order. To said Answer filed by the plaintiff, defendants took vigorous exception. The Court thereafter set the objections to plaintiff's Answer to Interrogatory No. 2 for

hearing on February 20, 1974, and in the course of this hearing the Court heard argument of plaintiff and defendant counsel with reference to said Interrogatory No. 2.

Accordingly, the Court finds that plaintiff concluded that its Answer to defendants' Interrogatory No. 2 (second set) filed January 28, 1974, satisfied the Court's Order to answer said Interrogatory fully and completely and in good faith.

The Court now finds that said Answer has failed to satisfy the Court's Order and that the attachment to plaintiff's Answer is only an advisory statement for a period of eight months ending October 31, 1971, and that one of the principal questions in this action is whether or not plaintiff's financial difficulties were caused by acts and conduct of the defendants or caused by the cost and operation of its business.

The Court further finds that plaintiff was not authorized nor permitted to have its expert witness, Dr. Benton Gup, see, review and analyze the defendants' cost of production answers until first plaintiff had answered defendants' Interrogatory No. 2. Notwithstanding this Order and plaintiff assuming that its Answer of January 28, 1974, was satisfactory, said plaintiff did proceed in violation of the Court's Order to permit and allow its expert, Dr. Benton Gup, to see, review and analyze some, if not all, of the defendants' cost data.

IT IS NOW, THEREFORE, ORDERED
BY THE COURT:

1. That the plaintiff within 60 days from the date hereof file its Answer in good faith setting out in detail its cost for the years involved for the production and distribution of refrigerant gas.

2. That should the plaintiff in good faith require additional time, such request shall be granted.

3. That the plaintiff's expert witness, Dr. Benton Gup not be permitted to see, review or analyze any further reports of costs of the defendants until such time as plaintiff has answered defendants' Interrogatory No. 2 as outlined above.

4. That all further discovery in this action shall be and is hereby stayed until plaintiff answers defendants' Interrogatory No. 2 as herein provided.

Dated this 21st day of February, 1974.

/s/ Luther Bohanon
UNITED STATES DISTRICT JUDGE